SENTENCING COMMISSION SPEECH

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I stand before you today to condemn the United States Sentencing Guidelines for the offense of illegal re-entry after deportation and to ask that you make needed changes to the Guideline which will avoid double and triple counting of a single offense, which will limit the use of older prior convictions, and which will reduce the sixteen level enhancement in section 2L1.2(A)(I) for all but the most serious prior criminal offenses.

An abiding principle of justice in this country is that, in sentencing a criminal offender, a judge should "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify the crime and punishment." *Koon v. United States,* 518 U.S. 81, 113 (1996). Sadly, section 2L1.2 of the United States Sentencing Guidelines and its cookie-cutter approach to sentencing in cases of illegal reentry after deportation fails to respect that abiding principle and often results in a recommended Guideline sentence for undocumented immigrants which is unreasonable, unjust and racist.

Our country is a nation of immigrants, which makes the current sentencing regime for illegal re-entry even more incomprehensible. The offense of illegal re-entry is nothing more than an economic crime whose only cause – the dream of a better life in America – is a dream as old as the United States. Every case of illegal re-entry is marked by the compelling mitigating circumstances born in this American dream: some people who are charged with illegal re-entry return to the United States only because they have spent most of their life in this country, because all of their family live here, or because there is no life for them in their native land; other defendants return to the United States for the most obvious economic reason – to obtain more money to care for their family. In short, the offense of illegal re-entry is a non-violent crime inevitably fueled by the American dream – the inexorable pull of returning to a country where your children live, or where your grew up, or where you could make as much in one day as you could make in a week in your foreign land. Sadly that epic dream is now fouled by an unreasonable sentencing regime which imposes unnecessarily harsh sentences because a line in the desert separates families without mercy.

The United States Sentencing Guidelines treat cases of illegal re-entry in a highly unusual manner which is unique to the Guidelines. The Guidelines permit double and triple counting of the same offense, contain no limit on the age of a prior conviction, and provide for a sixteen level increase in the base offense level for prior crimes of violence without any rational justification. Each of these failings must be addressed by this Commission.

Section 2L1.2 of the Guidelines gives heavy weight to a defendant's prior conviction in establishing his offense level and contains no limitation on the **multiple use** of the prior felony offense to: (1) raise the maximum sentence; (2) increase the offense level; and (3) calculate the defendant's criminal history category courts. Many courts and commentators have criticized this unfair result as an unreasonable form of **double** and **triple counting.** The Commission should fix this flaw and prevent a prior offense which was used to raise the offense level under 2L1.2 from being used again in calculating a defendant's criminal history.

Moreover, unlike other sections of the Guidelines such as section 4A1.1, the Guidelines for illegal re-entry contain no limitation on the **age** of the prior felony which is used to enhance a recommended sentence. As a result, prior felony sentences which are more than fifteen years old can be used to enhance a criminal sentence for illegal reentry without limitation. Similarly, unlike section 4A1.1, with the exception of certain drug offenses, the Guidelines for illegal re-entry contain no limitation which accounts for the **length** of the prior sentence imposed and individuals can be assessed a sixteen-level increase for a previous "crime of violence" which only resulted in a sentence of probation or time served. The Commission should address these failings by preventing the use of a prior felony conviction that is more than fifteen years old from being used to increase a base offense level under section 2L1.2 and by prohibiting increases in the base offense levels for prior felony crimes of violence which resulted in a sentence of less than one year and one month.

Finally, the sixteen-level increase under section 2L1.2 (b)(1)(A) for individuals who have previously been deported for a crime of violence often results in a mismatch between the defendant's prior conduct and the recommended sentence because the Guidelines do not distinguish between prior crimes of violence that are more serious and those that are less serious; instead, the Guidelines call for a sixteen-level increase for *any* crime of violence, alien

smuggling offense or serious drug offense, thereby classifying all murderers, rapist, and robbers in the same category as immigrants who previously played a minor role in transporting fellow immigrants, or who threw a match into an ex-girlfriend's car, or who were caught up in a bar fight during a drunken brawl. The Commission should correct this arbitrary result by limiting the sixteen level increase to the most serious of criminal offenses.

In order to assess the inherent unreasonableness of this one-size-fits-all Guideline for illegal re-entry, it is important to recognize that the recommended base offense level of twenty four under 2L1.1(b)(1)(A) is the same or greater offensive level that the Court could impose for the crimes of aggravated assault with a dangerous weapon (U.S.S.G. § 2A2.2), abusive sexual contact (U.S.S.G. § 2A3.4), threatening or harassing communications (U.S.S.G. § 2A6.1), stalking (U.S.S.G. § 2A6.2), larceny of not more than $400,000 (U.S.S.G. §2B1.1), theft of cultural resources (U.S.S.G. §2B1.5); residential burglary with a loss between $10,000 and $50,000 (U.S.S.G 2B2.1) or robbery (U.S.S.G. § 2B3.1). As a result of this unreasonable increase, it is quite common in District Courts throughout the Southwest to see that individuals who are sentenced for illegal re-entry after deportation often receive the greatest sentenced imposed by the Court that day, even longer than the sentences imposed on American citizens who are guilty of drug distribution or other economic crimes.

The Guidelines profess that an individual's race, national origin, creed, religion or socio-economic status are not relevant in the determination of a criminal sentence. (U.S.S.G. § 5H1.10.) And yet it is hard to see how anything other than race and national origin can be at play in a sentencing regime which operates to so uniquely disadvantage foreign nationals. In order to remove the unseemly specter that racism affects the sentencing regime for cases of illegal re-entry, I urge the United States Sentencing Commission to adopt long-overdue changes to the Sentencing Guidelines for the offense of illegal re-entry after deportation.